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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GAVIOTA COAST CONSERVANCY, Petitioner and Respondent, v. SANTA BARBARA COUNTY, Respondent. LYNN BALLANTYNE, Real Party in Interest and Appellant.	2d Civil No. B216420 (Super. Ct. No. 1302380) (Santa Barbara County)

Lynn Ballantyne appeals the grant of a petition for writ of mandate in favor of respondent Gaviota Coast Conservancy under the California Environmental Quality Act (CEQA; Pub. Res. Code, § 21000 et seq.)[1] In 2008, County of Santa Barbara (County) adopted a mitigated negative declaration and approved Ballantyne's project to build a 13,333 square foot single family residence and garage, a 1,368 square foot detached guest house and garage, and a barn on the Gaviota Coast.

[1] All statutory references are to the Public Resources Code unless otherwise indicated.

The trial court issued a peremptory writ of mandate directing County to rescind approval of the project and to vacate adoption of the mitigated negative declaration. County was ordered to prepare a focused environmental impact report (EIR) on the aesthetics and visual impact of the project looking south toward the project from Farren Road. Appellant contends that this ruling is erroneous.

We affirm concluding that County erred in adopting the mitigated negative declaration. Substantial evidence supports a "fair argument" that the proposed project may have a significant effect on the environment and that a focused EIR is required to address the aesthetics and visual impact of the project from Farren Road. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.)

The Project

In May 2005, Ballantyne applied for a land use permit to build a single family dwelling and garage, a guest house and garage, and a barn on a 17.1 acre parcel at 500 Farren Road. The property is two miles west of Goleta and is subject to the provisions of the Goleta Community Plan. Located on the north side (uphill side) of Highway 101, the property is accessible from Farren Road, a public road that travels north to the mountains where it comes to a dead end. The property has steep slopes and is surrounded on three sides by rural land zoned for agricultural use.

County Planning and Development denied the permit application because the project was inconsistent with County's Comprehensive Plan, Land Use Element Visual Resource Policy 2 and County Zoning Code section 35-212. Planning and Development recommended that Ballantyne revise the project and asked the Board of Architectural Review to review the project and provide guidance.

In April 2006, Ballantyne submitted revised project plans to reduce the height of the residence and lower the building pad elevation. Planning and

Development again found that the project did not comply with Visual Resource Policy 2 and the County Zoning Code.

Ballantyne appealed the decision to the County Planning Commission and, before the appeal was heard, modified the project to add a 660 foot long earth berm to block views of the residence from Highway 101 and Farren Road from the southeast and southwest. Planning and Development recommended that the project application be denied because the residence would still be visible from Farren Road from the north.

On November 8, 2006, Planning Commission approved the project by a split vote but modified the project by reducing the height of the berm and moving the building footprint 20 to 30 feet north.

Respondent Gaviota Coast Conservancy (GCC) appealed the Planning Commission decision to the County Board of Supervisors, contending that the project required a CEQA environmental review. On June 19, 2007, the Board of Supervisors ordered an environmental study to determine whether an EIR was required. County hired Rincon Consultants, Inc. (Rincon), an independent environmental consultant, to prepare an initial study and a mitigated negative declaration.

The Rincon Memo

Rincon prepared an initial study and a draft Mitigated Negative Declaration (MND) which were circulated for public comment.

In a June 12, 2008 memo, Rincon noted that the draft MND erroneously stated that the aesthetic impacts would be minimal because Farren Road was not an important view location. Based on public comments regarding recreational use of the road and an EIR for a different project (the Santa Barbara Ranch Project) which identified part of Farren Road as a "key observation point," the memo stated that a "fair argument" could be made that Farren Road was an important

view location. Rincon recommended that a focused EIR be prepared to address aesthetics and the visual impact of the project from Farren Road.

The Rincon memo warned that approval of the project without an EIR would be vulnerable to legal challenge and suggested a second course of action: "If the county elects to move forward with the processing of an MND for the proposed project, we would suggest making the following revisions to the discussion to address the various comments made with respect to the analysis of impacts and policy consistent with respect to Farren Road." Planning and Development responded that the EIR recommendation was premature because Rincon had not yet provided an analysis of views of the project from Farren Road or considered whether the key observation points described in the Santa Barbara Ranch EIR were relevant to the Ballantyne project.

At a July 15, 2008 hearing, the Board of Supervisors approved the project by a three-to-two vote and adopted the MND. It found that "[t]he proposed berm immediately south of the residence will increase the profile of the natural horizon and ensure that the residence does not intrude into the skyline as seen from Highway 101, Farren Road and other public viewing places."

The CEQA Action

GCC filed a writ petition alleging that the project was subject to CEQA, that the project was inconsistent with County's Visual Resource Policy and Zoning Code, and that the project required an EIR. Ballantyne opposed the petition on the ground that the project was subject to a CEQA ministerial exemption and a small structures exemption. Ballantyne argued that even if an environmental assessment was required, that the MND was sufficient.

The trial court found the project was not subject to a small structures exemption and that the CEQA ministerial exemption did not apply. "The primary issue here is the view, particularly from Farren Road looking south toward the

project. " Citing expert testimony, staff reports, and an earlier photo simulation of the project, the trial court found: "There is no question that the project can be seen from Farren Road looking south to the project" and that the road is used by recreational hikers, bicyclists, birdwatchers, and persons accessing ranches north of the project.

The trial court found that Farren Road is a public road, that the road is designated as a recreational trail on a County Parks, Recreation and Trails Map, and that the road is a public viewing area. The court concluded there "is substantial evidence of a significant environment impact on scenic views" and that the project may conflict with County policies embodied in the General Plan and the Land Use and Development Code section 35.30.060. County was ordered to vacate its adoption of the mitigated negative declaration and ordered to prepare a focused EIR on the aesthetics and visual impact of the project looking south to the project from Farren Road.

Standard of Review

On appeal, we independently review the administrative record to determine whether there is substantial evidence supporting a "fair argument" that the project as proposed may have a significant impact on the environment. (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 998, 1002.) The "fair argument" test imposes a low threshold requirement for the preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review. (*No Oil Inc v. City of Los Angeles* (1974) 13 Cal.3d 68, 83-84.) Where project approval is based on a mitigated negative declaration instead of an EIR, "the courts owe no deference to the lead agency's determination. Review is de novo, *with a preference for resolving doubts in favor of environmental review*. [Citations.]" (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

Ministerial Project

Ballantyne argues that an environmental review is not required because CEQA exempts ministerial projects such as a single family residence. (§ 21080; *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 733.) "The CEQA Guidelines define a 'ministerial' decision as one that involves little or no personal judgment by the public agency or official about the wisdom or manner of carrying out the project. [Citation.] The agency or official merely applies the particular law or regulation to the facts. [Citation.]" (Koskta & Zischke, Practice Under the Cal. Environmental Quality Act (Cont'd. Ed. Bar 2d ed 2009) § 4.26, p. 181.) If project approval involves both ministerial and discretionary actions, the project is deemed discretionary and subject to CEQA. (Cal. Code Regs. tit. 14, § 15268(d); *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272-273.)

Ballantyne contends that the project is ministerial because project revisions were voluntarily made. County, however, imposed other project conditions to change the height of the 660 foot long berm, to relocate the building to the north, and to use approved landscaping and a lighting plan to reduce visibility.

Project revisions were imposed to make the project more consistent with County's Visual Resource Policy 2, a policy that does not describe fixed standards or objective measurements. Visual Resource Policy 2 and an Inland Zoning Ordinance (§ 35-213) state in pertinent part: " '*In areas designated as rural on the land use plan maps, the height, scale, and design of structures shall be compatible with the character of the surrounding natural environment . . . . Structures shall be subordinate in appearance to natural landforms; shall be designed to follow the natural contours of the landscape; and shall be sited so as not to intrude into the skyline as seen from public viewing places.*' "

Ballantyne asserts that other projects on the Gaviota Coast have been treated as ministerial projects, but that is not dispositive. County determined that project revisions had to be made due to its size and location, and imposed 28 project conditions. The determination is entitled to great weight (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.)[2] and consistent with the County Land Use and Development Code, section 35.82.110 which provides that land use permit applications should not be approved unless the project complies "with the provisions of the Comprehensive plan, including any applicable community or area plan, this Development Code, and any conditions established by the County."

Exercising its discretion, County required project changes to mitigate environmental consequences an EIR might uncover. (See e.g., *Friends of Westwood, Inc. v. City of Los Angeles, supra,* 191 Cal.App.3d at p. 273.) "'These decisions may have great environmental significance relative to one physical site, negligible significance in another. Inevitably they evoke a strong admixture of discretion.' [Citation.]" (*Id*., at p. 272.) There is no merit to the argument that Ballantyne could

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[2] Ballantyne complains that Planning Commissioner Michael Cooney remarked that County, as a matter of policy, treated applications for a single family residence as exempt from CEQA review. Ballantyne further claims that 50 land use permits for single family residences were approved or pending in the Goleta/Gaviota area, none of which had to go through environmental review.

We reject the argument because there is no evidence that the other projects involved a single family residence on Farren Road prominently sited on a rural ridgeline. Commissioner Cooney stated that the Ballantyne Project is a large project which "is going to set a precedent" because "this is part of the Gaviota Coast. It is not part of Goleta . . . . [¶] . . . It is not this beautiful, contemporary design that is problematic. It is where the applicants propose to put it. . . . [T]hey are proposing to put it on top of a ridge which is highly visible, not only from the areas that we've discussed today, but you can see it from distant areas up and down the coast. It will be dramatic." A second Planning Commissioner, Cecilia Brown agreed that it was a siting problem and that landscaping "will not resolve any of the view shed issues from north Farren Road. . . ."

have compelled County to approve the project without revisions as a mere ministerial matter. (See e.g., *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1139.)

Category 3 Small Structure Exemption

Ballantyne argues that the project is subject to a Category 3 small structure exemption which includes "a single family residence or a second dwelling unit in a residential zone." (Cal. Code Regs. tit. 14, § 15303(a).) [3] The exemption is found in the CEQA guidelines but "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language. [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125.) This ensures that in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review. (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697.) If the law were otherwise, a single family residence the size of a castle would be exempt from environmental review no matter where it is built or how much it obstructs public views of the skyline.

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[3] Categorical exemptions are applied only where the project is not ministerial. (Cal. Code Regs, tit. 14; § 15300.1; see *Association for Protection etc. Values v. City of Ukiah, supra,* 2 Cal.App.4th at p. 733.)

California Code of Regulations, title 14, section 15303 states in pertinent part: "Class 3 consists of construction and location of limited numbers of new, small facilities or structures . . . . The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to: [¶] (a) *One single-family residence, or a second dwelling unit in a residential zone.* . . . [¶] . . . (c) . . . In urbanized areas, the exemption also applies to up to four commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive." (Emphasis added.)

Here the project is prominently sited on a ridge line and surrounded by rural grazing land, zoned AG-II for agricultural use. Although a Category 3 exemption applies to small structures, the project is not small or a typical single family residence. The main residence (13,333 square feet in size) will be four times larger than other single family homes in the area, measure more than 300 feet in length across a ridge line, and will exceed the 10,000 square foot "small structure" exemption for commercial buildings. (*Ante*, fn. 4.) When Planning and Development denied the application for a land use permit, it found that the residence would intrude into the skyline and did not comply with the visual resources provisions in the Comprehensive Plan and Inland Zoning Ordinance. Ballantyne was advised that planting citrus trees to screen the residence would not solve the problem but siting the residence north of the ridgeline could minimize the visual impact.

A project location, here a scenic ridgeline, can defeat a categorical exemption. (See Cal. Code Regs., tit. 14, § 15300.2, subd. (a).) "A categorically exempt project, like a single family residence, loses its exempt status 'where the project may impact on an environmental resource of . . . critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state or local agencies.' [Citation.] " (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1105.)

It is uncontroverted that the project is not in a residential zone, is prominently sited on a ridgeline in a rural agricultural area, and may impact public views of the skyline from a public road used for recreational purposes. The Santa Barbara Ranch EIR described Farren Road as a "key observation point" that provides long scenic vistas for recreational users. Substantial evidence supports the finding that the project is not subject to a Category 3 exemption. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified*

School Dist. (2006) 139 Cal.App.4th 1356, 1382.) "If there is a 'reasonable possibility' that an activity will have a significant effect on the environment due to 'unusual circumstances,' an agency may not find the activity to be categorically exempt from CEQA. [Citation]." (Kostka & Zischke, Practice Under the Cal. Environmental Act, *supra,* § 5.72, p. 246; see *Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at pp. 124-125.)

Mitigated Negative Declaration

CEQA Guidelines establish a rebuttable presumption that any substantial, negative aesthetic effect (i.e., the negative effect of the project on public views) is to be considered a significant environmental impact for CEQA purposes. (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1604.) The MND states that Farren Road does not qualify as a public viewing place because the road is not a throughway for the general public and "is not formally designated as a public view corridor, nor has it been formally identified as an important public viewing location in any adopted County policy document."

The trial court concluded that County's Visual Resource Policy 2 does not require that a public viewing place be on a thoroughfare or that it be a formally designated public view corridor. We concur. Local Coastal Plan Visual Resource Policy 2 protects views to scenic resources "from public areas such as highways, roads, beaches, parks, coastal trails, access ways, and vista points." It is not limited to formally designated view corridors. The same visual resource policy is set forth in the General Plan and the Land Use and Development Code which provide that the primary concern of the Coastal Act is to protect views of scenic resources from public areas such as roads, coastal trails and accessways, and vista points.

The administrative record shows that Farren Road is used for bicycling, bird-watching, sunset enjoyment, and as a trail head. It is used for recreational

purposes by track teams, photographers, artists, hikers, sailplane and glider enthusiasts, and other recreational users. An EIR for another Gaviota Coast project (Santa Barbara Ranch) identified Farren Road as "a key observation point" for recreational users and reported that Farren Road was in County's proposed recreational trail system. The June 12, 2008 Rincon memo acknowledged that a "fair argument" could be made that the project may have a significant effect on the environment with respect to public views from Farren Road. Similar concerns were expressed by county staff, by architectural expert and Goleta Planning Commissioner Edward Easton, by the Board of Architectural Review who reviewed the project three times, by neighbors, by a visual impact expert (Ken Doud), and in project-related correspondence.

When the project was first reviewed, story poles were erected to show the visual profile of the project as seen from Farren Road. Ballantyne argues that the story poles reflect a prior rendering of the project that has since changed. But those changes involve a minor shift of the building footprint. Rincon recommended a $7,300 photo simulation study to determine the visual impact of the project as modified but Ballantyne refused to pay for the study. Ballantyne assured County that the photos, plans, and submittals for prior iterations were accurate and could be relied on in preparing the MND. In a March 4, 2008 letter, Ballantyne's attorney stated: "To the extent that Rincon proposed to spend ***any*** sums related to a 'visual analysis' of the Project's 'visibility' from higher elevations, the Applicants object to such costs as unreasonable."

The June 12, 2008 Rincon memo recommended that County: (1) prepare a focused EIR addressing the project's visual impacts looking south from Farren Road, or in the alternative, (2) adopt the MND with revisions to address concerns about visual impacts and policy consistency.

The Final MND states that the project will be "visually prominent" from Farren Road but "could be found to be consistent" with county policy because Farren Road "does not appear to meet any criteria for classification as an important 'public viewing place'. . . . " It states that "[t]he proposed residence would be highly visible from Farren Road" and would alter views from various vantage points on Farren Road which is a proposed on-road trail and currently used as a recreational trail by hikers and bicyclists.

Ballantyne contends that the MND serves as the functional equivalent of an EIR, but the MND erroneously assumes that key observation points on Farren Road are not protected by County's Visual Resource Policy. The April 12, 2008 Rincon memo warned that the mitigated negative declaration "relies heavily on the notion that Farren Road is not an important view corridor," a position which contradicts the Santa Barbara Ranch EIR. " 'The very uncertainty created by the conflicting assertions made by the [Rincon memo and the Final MND] as to the environmental effect . . . underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation.' " (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 85.)

The administrative record includes statements by experts, reviewing agencies, and area residents that the project may create significant visual and aesthetic impacts on public view areas. (See *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402 [personal observations of residents substantial evidence of aesthetic impact].) Although the 660 foot long berm will screen the residence from Highway 101, it will not screen the residence as seen from Farren Road north of the project. This is why Rincon requested six photocompositions "'to provide a firm, technically verifiable basis for the assessment of visual impacts and for the County's determination of project

consistency with visual resources policies.'" Ballantyne refused to pay for the visualization study.

Ballantyne requests that the court visit the project site and see for itself whether the project obstructs a public view. The project, however, has been revised so many times that it is unknown how the project will impact public views from Farren Road. That is why Rincon recommended a focused EIR. "It is the function of an EIR, not a negative declaration, to resolve conflicting claims based on substantial evidence as to the environmental effects of a project. [Citation.]" (*Pocket Protectors v. City of Sacramento, supra,* 124 Cal.App.4th at p. 935.)

Even if Ballantyne could point to substantial evidence that no significant impact will occur, a mitigated negative declaration cannot be upheld where the administrative record contains substantial evidence to the contrary. (*Ocean View Estate Homeowners Ass'n v. Montecito Water Dist., supra,* 116 Cal.App.4th at p. 399.) Where, as here, no EIR "has been prepared, neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." (*Pocket Protectors v. City of Sacramento, supra,* 124 Cal.App.4th at p. 935.)

The judgment is affirmed. GCC is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE,.J.

PERREN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

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